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able estoppel. And see *Reel v. Elder*, 62 Penn. St. 317 (1869). But "connivance" generally requires some corrupt intent on the part of the husband that the wife shall commit the crime, and not merely making preparations to detect her in an anticipated or

suspected infidelity: *Robbins v. Robbins*, 140 Mass. 528 (1886), distinguishing *Morrison v. Morrison*, 136 Mass. 310 (1884), which is rather a close case upon the facts.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

LYNN v. FREEMANSBURG BUILDING AND LOAN ASS'N.

Building associations incorporated under the Pennsylvania Act of 1859, and having no special power to impose fines, can do so only in the exercise of their general right to enact suitable by-laws for their government. The validity of such a by-law depends upon the reasonableness of the fines thereby imposed.

A by-law providing that every stockholder neglecting to pay his monthly dues and interest, "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him," is oppressive, extortionate, and unreasonable, and therefore invalid.

The sixth section of the Pennsylvania Act of April 10, 1879 (P. L. 17), providing that the fines or penalties imposed by building associations for non-payment of dues, interest, etc., "shall not exceed two per cent. per month on all arrearages," does not apply to associations incorporated prior to the passage of that act, who have not accepted the provisions thereof.

A stockholder in a building association gave it a mortgage to secure certain loans to him, for which his stock was also deposited as collateral. Being threatened with forfeiture of his stock under the by-laws, he subsequently paid the association a sum necessary to pay all his dues, interest, and fines; this money was applied in part to the payment of the fines claimed to be due under the by-laws. Subsequently the stockholder again became in default. The association forfeited his stock, and proceeded by *scire facias* on the mortgage. *Held*, that the stockholder was not estopped by his payment of the illegal fines from demanding that the sum paid by him, and applied to these fines, should be credited on the amount due on his mortgage.

ERROR to Court of Common Pleas of Northampton County.

Scire facias sur mortgage by the Freemansburg Building and Loan Association against Josephus Lynn.

By agreement of the parties, the case was heard without a jury by SCHUYLER, P. J., who found the following facts:

"The Freemansburg Building and Loan Association, plaintiff, was duly incorporated on November 20, 1872, under Act of

April 12, 1859 (P. L. 544). In October, 1874, the defendant became a member of the Association by subscribing for five shares of its capital stock, second series, and in October, 1876, he subscribed for twenty additional shares in the third series, but he subsequently withdrew six of these last-mentioned shares, which left him the owner of nineteen shares.

"The by-laws of the association provide, *inter alia*, as follows: Each stockholder, for each share held by him, must pay into the treasury at each stated monthly meeting, the sum of one dollar, which are called his monthly dues, until the value of the whole stock shall be sufficient to divide to each share of stock the sum of \$200. The holder of each share of stock is entitled to a loan from the association of \$200. These loans must be made in open meeting to the highest bidder, but no loan can be accepted at less than ten per cent. premium. When a loan is effected, the borrower receives the amount of loan bid, less the premium, but he must give his obligation for the full amount, and must pay interest on the same, monthly. To secure the repayment of the loan, with interest, the borrower is required to give a satisfactory bond and mortgage, and, in addition, for every loan of \$200, he must transfer one share of stock to the association, as collateral security. Article 7, § 1, of the by-laws of the association, provides as follows: 'Each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as often as the same shall become due and payable, shall forfeit and pay the additional sum of ten cents, monthly, on each and every dollar due him.' Article 5, § 5, of the by-laws, provides as follows: 'Each stockholder or trustee, on receiving his certificate of stock, shall be considered as obligating himself to pay principally his monthly dues, fines, and interests, and in all respects to comply with the requisitions of the constitution and by-laws, and the rules and regulations of the board of directors.' Article 8 of the by-laws provides as follows: 'If any stockholder or trustee shall continue to neglect or refuse to pay his, her, or their monthly dues and fines for the space of six months, his, her, or their share or shares of stock may be declared forfeited by the board of directors, when the same shall revert to the association. After first deducting

the proportion of losses and expenses, and all fines, the defaulting stockholder shall be entitled to receive any balance of his, her, or their monthly payments, and shall from thenceforth cease to be a member of this association.' Article 9, § 2, of the by-laws, provides as follows: 'Any stockholder who has received a loan, may repay the same at any time, and, in case of the repayment thereof before the expiration of the eighth year after the organization of the corporation, there shall be refunded to such stockholder one-eighth of the premiums paid for every year of the said eight years then unexpired.'

"The defendant, as the owner of nineteen shares of stock, being entitled to borrow from the association \$3,800, at different times bid out smaller sums aggregating that amount, at an average premium of 22 9-10 per centum, to secure the payment of which, with interest, he assigned his stock as collateral, and also gave the mortgage in suit, which is dated December 28, 1876. The mortgage calls for the payment of \$5,000, but the correct sum is \$3,800. After giving the mortgage the defendant frequently defaulted in the payment of both his monthly dues and interest, in consequence of which he was charged with a fine of ten cents monthly, on each dollar of his indebtedness at the time the fines were imposed. To illustrate: Defendant's monthly dues and interest amounted to \$38. In February, 1879, he defaulted. By adding the ten per cent. we have his total indebtedness for that month, \$41.80. He defaulted again the next month, making his total indebtedness, including the fine for February, \$79.80. To get at the amount of his fines for March, ten per cent. on the \$79.80 was calculated, and so on to the end of the chapter. An account of these fines was kept, not only on the books of the association, but also in a book furnished to the defendant for his information.

"The defendant, from time to time, made payments on account of his dues, interest, and fines, but notwithstanding these payments he was on May 22, 1882, indebted to the association, as shown by the books, in the following sum: Dues, \$302; interest, \$302; fines, \$360.13,—total, \$964.13. In addition to these sums the defendant was then indebted on protested checks given for fines and dues, for which he had received credit, in a sum sufficient to increase his indebtedness for fines, dues and

interest to considerably more than \$1,000. On the said twenty-second day of May the defendant, under the threat that his mortgage would be foreclosed, paid \$1,000. A few days afterwards he paid in addition a sum sufficient to cancel his entire indebtedness to the association for fines, dues, and interest. These payments were made by the defendant voluntarily, with a full knowledge of the facts, and for the purpose of squaring his accounts with the association, and they were so applied. After thus squaring his accounts the defendant continued to be a member of the association, sometimes paying his dues and interest, and sometimes defaulting as before, until February 14, 1885, when his stock was declared forfeited at a meeting of the board of directors, the defendant having neglected to pay his monthly dues and fines for the space of six months prior to the date last mentioned.

“Between May 22, 1882, and February 14, 1885, the defendant became indebted to the association for dues, interest, and fines in the following sums: Dues, \$627; interest, \$627; fines, \$1,536.38,—total, \$2,800.38. During the same period he made payments, as appears from the books of the association, as follows: Dues, \$335; interest, \$335; fines, \$442.59,—total, \$1,112.59. Included in this last sum are a number of checks aggregating \$202.18, which the plaintiff alleges were not paid, but the evidence as to these checks is not sufficiently clear to permit of their adjustment in the present suit. Since suit brought the defendant has paid to the association \$175.37, which the association has never appropriated, although still holding the money. Defendant now asks to have this money appropriated to the payment of the mortgage. The defendant has received from the association, as the net proceeds of his mortgage, \$2,946, and \$150 when he withdrew his six shares; total, \$3,096. He has paid to the association the following sums: Dues, \$1,878; interest, \$1,551.50; fines, \$950.31; since suit brought, \$175.37,—total, \$4,555.18.”

The court calculated the amount due on the mortgage, as follows: “Charge the defendant with \$2,257, which is the difference between \$3,800, the original amount of the mortgage, and \$1,543, which is the amount of dues and interest paid by the defendant up to and including the settlement of May 22,

1882. Also with dues and interest, at the rate of \$38 per month, from May 22, 1882, up to February 14, 1885, when defendant's stock was forfeited, less \$670 paid on account of dues and interest during this period. Also with interest on \$2,257 from February 14, 1885, to this date, crediting the following payments: May 9, 1885, \$49.25; June 24, 1885, \$41.53; July 27, 1885, \$45.13; August 26, 1885, \$39.46. The balance will be the amount for which judgment should be entered against the defendant." Whereupon defendant took this writ.

Edward J. Fox and Edward J. Fox, Jr., for plaintiff in error.
O. H. Meyers and B. F. Fackenthall, for defendant in error.

The opinion of the court was delivered by

GREEN, J.—We are clearly of opinion that the literal meaning of the by-laws of this plaintiff, which imposes fines upon members for non-payment of dues or interest, is that the fine of 10 per cent. is imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause. This would include fines previously imposed, as well as the amount previously owing for dues and interest. The question then arises whether such a by-law is a valid exercise of the legislating power of the association. It is not claimed that the general law of 1859, under which the plaintiff was incorporated, confers any special power to impose fines, and hence we assume that the right to enact the by-law in question is merely the general right which all corporations possess of enacting suitable by-laws for their government. The provision of the sixth section of the Act of 1859 that no premiums, fines, or interest on such premiums that may accrue according to the provisions of the act shall be deemed usurious, must be held, so far as fines are concerned, to be limited to such fines as are imposed under by-laws which are lawful.

Is, then, the by-law in question a valid by-law? That depends upon a consideration of its meaning and effect. We have stated the meaning of this by-law to be that the fine is imposed each month upon the whole amount due at the end of each month, no matter for what cause. The words are: "Each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as often as the same shall become

due and payable shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." It is clear the ten cents penalty or forfeiture is to be paid *monthly*. This being so, it is to be repeated every month during which the amount due remains unpaid. The effect of this would be that at the end of December in any year the member was indebted \$50 to the association, and remained so throughout the year following, he would then owe as a fine twelve times the original penalty on that one default; in other words, 120 per cent. upon the principal sum for which default was made. In addition to this, he would also owe the full interest he might be paying on the amount expressed in his obligation, no matter how usurious that interest might be. Still further, as the balance is to be struck at the end of each month, the member would owe at that time all that he owed at the end of the preceding month, and, in addition thereto, the interest and penalty, for the current month, besides the dues, and the account would be made up by charging him with 10 per cent. upon the principal, the interest, and the fine due at the end of the preceding month, and adding them to the dues and interest for the current month. If another default was then made, the same process would be repeated at the end of each succeeding month during the continuance of the defaults. It is needless to enter into a detailed computation to show what the aggregate result of such a process would be in any given case. That it is unreasonable, extortionate, and oppressive to the last degree must be at once conceded. If the monthly penalty were 100 per cent. instead of 10 it would only be a difference in degree, not in character. Of course, if there is an unlimited right to impose, by means of a by-law, any amount of fine or penalty which the association may please to ordain, and the law is powerless to interfere, the results must be accepted, no matter how unjust or oppressive they may be. But we do not so understand the law upon this subject. The fines in this case were imposed by means of a corporate by-law. While it may be conceded that as between a corporation and one of its members a somewhat different rule would prevail from that which would be applicable as between the corporation and strangers, yet there is a limit of authority, even when corporators only are affected.

We have not been referred to any case in which an unlimited authority to impose fines by a building association has been declared by any court. A number of decisions adverse to such a right have been made by courts of last resort, though none by this court, the direct question having, apparently, never been before us. The legislature of Pennsylvania by the sixth section of the Act of April 10, 1879 (P. L. 17), enacted that "fines or penalties for the non-payment of installments of dues, interest, bonus, or premiums shall not exceed two per centum per month on all arrearages." If this plaintiff were subject to this law, the question would be settled at once, and all of the fines in excess of 2 per cent. per month would be undoubtedly illegal. But the plaintiff was chartered under the Act of 1859, and it is admitted, or at least found by the court below, and the findings not challenged, that it has never accepted the provisions of the Act of 1879, and therefore is not subject to it. We do not, however, see that this circumstance is very material, because there is no previous statutory authority to exact any specified fine, and the open question we are considering is, what is the law in the absence of such authority? It is very clear now, and since 1879, that the policy of the law in this commonwealth is that building associations shall not exact oppressive and extortionate fines from their defaulting members, and we feel amply justified in deciding, as we now do, that a fair inference flows from this legislation that fines in excess of 2 per cent. per month are oppressive and unreasonable, by policy of law. That policy is put in the form of explicit statutory mandate as to all associations which are subject to the operations of the Act of 1879, whether by subsequent incorporation, or by previous incorporation and subsequent acceptance.

As to the time anterior to the statute, we feel no hesitancy in saying that a monthly penalty of 10 per cent., repeated by arithmetical progression with each succeeding default, was clearly oppressive, extortionate, and unreasonable, by policy of law, and by the teachings of the enlightened conscience of man. The effect of such a taint upon a by-law is to render it void, and hence we are not called upon to fix upon any rate of fine which would have been reasonable, and hold the by-law good for that rate, and void only as to the excess. The taint is fatal

to its validity, and it is therefore without any force. The purpose of the fine is merely to enforce the payment of the dues and interest, and, as this is only an obligation for the payment of money, the extortionate character of the penalty becomes the more conspicuous in proportion to the amount by which it exceeds the ordinary rate allowed by law, and by general consent, for the use of money. No sound reason can be advanced for the necessity of exacting so gross a penalty for a mere omission to pay a debt.

The question has been before other courts than ours, and has been adjudged in accordance with the principles stated. Thus, in Ohio, the legislature of the State expressly authorized building and loan associations to levy and collect from their members "such sums of money, by rate of stated dues, fines, * * * as the corporation by its laws may adopt." Here would seem to be an unlimited authority to the associations to impose any amount of fines they might see fit; but the Supreme Court of Ohio said, in a case arising under its provisions: "It is to be regretted that the legislature was not more specific in making the grant of power thus intended to be conferred. * * * That there are limits, however, beyond which the corporation by its by-laws cannot go, is undoubted. (1) The amount of the fine must be reasonable; (2) it can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the corporation by reason of his membership; (3) it is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency." *Hagerman v. Building Ass'n*, 25 Ohio St. 186 (1874); *Building Ass'n v. Gallagher*, Id. 208 (1874).

In *Endlich on Building Associations*, § 412, the writer says: "But the courts have been unanimous in discountenancing a repeated imposition of the same fine increased every time, upon the principle of arithmetical progression. Thus, where the fine upon each share's dues in arrear was for the first month 12 cents, for the second month 37 cents, for the third month 75 cents, and for the fourth month \$1.25, and for every following month 50 cents more than the amounts charged in the preceding one, the rate was held to be unreasonable and exorbitant;" citing *Build-*

ing Ass'n v. Gallier, cited by BIRDSEYE, J., in *Loan Ass'n v. Webster*, 25 Barb. 263. Mr. Endlich, in § 413 of his excellent work, says: "The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then attainable premiums upon the sale of money. The fine should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to lag behind. * * * A fine of from one to two per cent. per month would in nearly all cases be sufficient and just,"—citing *Loan Ass'n v. Thomson*, 52 Ga. 427 (1874). While we express no binding opinion upon this subject, as it is not necessarily before us, there is much good sense in the suggestion, and the amount of the reasonable fine intimated in such cases seems to accord very closely with the amount fixed by our own law of 1879.

The argument that only one fine could be imposed, because the legislature could not be presumed to have intended to authorize more than one, is not applicable in the present case, because we are construing, not a legislative enactment, which must be enforced as far as may be, but a by-law of a corporation which is plainly in violation of the principles we have stated, and therefore of no effect whatever. In Maryland, the same ruling appears to have been made, in the cases of *Shannon v. Building Ass'n*, 36 Md. 383, and *Building Ass'n v. Lewin*, 38 Id. 445 (1873). The general rule that by-laws of corporations must be reasonable, and must not be oppressive, on peril of invalidity, is such familiar doctrine that a citation of authorities in support of it is unnecessary. In Endlich on Building Associations, at § 271, it is said: "And all by-laws, to be binding, must be in conformity (1) with existing and supreme laws; * * * (2) with the charter, its letter and spirit; (3) with reason and equity." Ang. & A. Corp., § 347. The same rule exists as to ordinances of municipal governments, as was held in *Kneedler v. Borough of Norristown*, 100 Pa. St. 368 (1882).

For the reasons we have stated, we hold that the by-law of the plaintiff imposing the ten per cent. penalty in question, is unreasonable and oppressive, and therefore invalid and of no effect.

It is argued, however, that the fines, or some of them, were voluntarily paid by the defendant, and therefore cannot be recovered back. This is not an action to recover back the illegal fines, but a *seire facias* by the association on the mortgage given by the defendant, and the question is, for what amount shall judgment be entered? or, rather, how much is legally due on the mortgage? There is a clear distinction between a suit to recover back moneys which have been paid by mistake, either of law or fact, and interposing as a defense such payments as could not have been recovered on account of their illegality. In the latter class of cases the payments, as a rule, are credited on the amount legally due. This is always done in cases of usurious payments where the obligation is still outstanding. We can see no difference in principle between that class and the present. While it may be true that the fines are no part of the mortgage debt, it is also true that they are moneys paid by defendant to plaintiff in consequence of a relation of debtor and creditor existing between them, and, if the creditor has no right to receive them as fines, they have no right to receive them in any other capacity than as creditor. Being received by a creditor, it is obvious the moneys thus paid must be applied to whatever was legally due. Even if the question depended upon whether the defendants made the payments distinctively as for fines, the evidence is not at all clear that such was the fact. A gross sum was paid, of which the fines were a part, but no specific receipt was given, and the credits entered on the account were in aggregate sums. But we think this feature of the case quite immaterial, since the payments, so far as the fines are concerned, were for illegal demands which the plaintiff could not claim, and having received them, cannot, either in law or in conscience, retain them. The question in this proceeding, is only how much is legally due upon the obligation in suit, and, in determining that question, credit should be given for all moneys claimed and received as fines.

Judgment reversed, and record remitted, with directions that the amount due, if any, upon the mortgage in suit, be determined in accordance with the foregoing opinion.

Generally — Definition.—Fine is a common instrument by which to compel performance of duties by members of corporations, associations, and societies. Attendance at corporate assemblies and acceptance of a corporate

office are duties each member owes to the corporation to which he belongs, and their performance may be required by corporate by-law and compelled by the imposition of a fine.

A fine may be defined as "a pecuniary penalty, and is commonly (perhaps always) to be collected by a suit in some form:" *Gosselink v. Campbell*, 4 Iowa, 300 (1856). Another definition is "amends or pecuniary mulct for an offense committed:" *State v. Robertson*, 15 Rich. (S. C.) 20 (1867). A better definition is that given by Mr. Endlich in his work on Building Associations (§ 379): "Fines are impositions, in the nature of liquidated damages, upon members neglecting to pay, at the proper time to the society, any moneys which are due to the latter from them." And for various other definitions of "fine," see *De Peyster v. Michael*, 6 N. Y. 495 (1882); *State v. Steen*, 14 Tex. 398 (1855); *Village of Lancaster v. Richardson*, 4 Lans. (N. Y.) 140 (1871); *McGregor v. Comstock*, 17 N. Y. 162 (1852); *Hanscomb v. Russell*, 11 Gray, 373 (1858); *Fein v. United States*, 1 Wyoming, 247 (1875); *Laubenheimer v. Mann*, 19 Wis. 520 (1865); *In re Ison*, 6 Oregon, 469 (1877); *Common Council v. Fairchild*, 1 Ind. 315 (1858); *U. S. v. Simms*, 1 Cranch, 252 (1803); *Re Brittingham*, D. Ct. S. D. N. Y., December, 1880; 5 Fed. R. 191.

Validity.—"The validity and binding effect of their fines, generally, depends upon statutory authority conferred upon the society for that purpose, expressly or by implication, and upon a by-law or regulation establishing the rate and principles which are to govern their assessment:" Endlich, *Build. Ass'n*, § 379.

Statutory authority to impose fines is essential, else the company cannot levy them: *Jarrett v. Cope*, 68 Pa. St. 67 (1871); *Hoernerstown B. Ass'n*, 82

Pa. St. 180 (1876); *Link v. Germantown B. Ass'n*, 89 Pa. St. 15 (1879).

Requisites.—The requisites of a fine are clearly indicated by the Supreme Court of Ohio, which says: "That there are limits, however, beyond which the corporation by its by-laws cannot go, is undoubted. 1. The amount of the fine must be reasonable. 2. It can be imposed only by way of punishment for some delinquency in the performance of a duty, which the member may owe to the corporation by reason of his membership. 3. It is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency:" *Hugerman v. Ohio, etc., Ass'n*, 25 Ohio St. 202 (1874).

Ultra vires.—Besides possessing these requisites the fine must not be *ultra vires*—that is, it must not exceed the amount of money which the society or company may lawfully levy, collect, and use. A company's power to fine does not authorize it to levy a tax. The fines levied must not be such as to produce to the company, if successfully levied and collected, a sum greater than it needs or may lawfully acquire for any of its legitimate purposes. This was decided in the London Pipe Co.'s case, wherein a by-law was held bad, which provided that every freeman, using or not using the said art, mystery, or trade, should pay yearly to the company, 8s. to be paid quarterly, and every journeyman of the company, 4s. yearly, to be paid quarterly, and that every person refusing, should forfeit twice the sum. Lord TENTERDEN said. "It seems to us, that as the amount of these contributions is not confined to what the proper demands of the company may require, but is uniformly the same, let the company's expenditure be little or great, and as there is no state-

ment from which we can collect that the rightful expenditure of the company requires any such contribution, this, which is in the nature of a tax upon the company, cannot be supported." *London Pipe Co. v. Woodroffe*, 7 Barn. & Cress. 852 (1828). But a by-law that every inn-holder, being a brother of the company, should pay 2s. per quarter, to be applied to particular purposes, for the benefit of the company, was held good, the purposes for which the money so collected might be applied, being commensurate with the payments required: *Innholder's Case*, 1 Wils. 281 (1750).

Indefiniteness may invalidate a fine. Thus, a by-law requiring "any person" to accept a corporate office, on penalty of fine, is objectionable as including persons not members of the corporation and ineligible to its offices: *Mayor of Oxford v. Wildgoose*, 3 Lev. 293; *London Pipe Co. v. Woodroffe*, 7 Barn. & Cress. 852 (1828). But the subject-matter and context of the by-law may show that it applies only to "persons" who are members of the corporation, in which case it will be held good: *London Pipe Co. v. Woodroffe*, 7 Barn. & Cress. 852 (1828).

Reasonableness.—The amount of the fine where not fixed by charter or statute is discretionary with the society, association, or company, limited, however, by the rule that the amount of the fine must be reasonable. An exorbitant fine will be relieved against in equity: *Mulloy v. Fifth Ward B. A.*, 2 McArth. 594 (1876), and see cases *infra*. For instance, in a building society not more than one fine can be imposed for the non-payment of any installment of principal of a loan: *Forest City, etc., Ass'n v. Gallagher*, 25 Ohio St. 208 (1874); *Hagerman v. Ohio, etc., B. Ass'n*, 25 Id. 186 (1874). Cumula-

tive fines are not allowed: *Monumental Permanent, etc., Soc. v. Lewin*, 38 Md. 445 (1873); *Siannon v. Howard Mut. Bldg. Ass'n*, 36 Id. 384 (1872). See also, *Ocmulgee B. & L. Ass'n v. Thomson*, 52 Ga. 428 (1874). "A second fine," say the Supreme Court of Ohio, "for the non-payment of the same stated due, is a second punishment for the same offense. It is not a sufficient answer to the last proposition to say that the non-payment of the same stated due at a subsequent day is a new offense. The obligation to pay when the due first matured was complete. No new obligation to pay it in the future is undertaken by the defaulting member, but the obligation or duty to pay it at maturity continues after default, until payment be made." *Hagerman v. Ohio, etc., Ass'n*, 25 Ohio St. 203 (1874).

Rules imposing fines are also always strictly construed in favor of the member fined. A rule fining threepence per share for the first month's delinquency and 3d. per share additional for each succeeding month's delinquency, does not mean 3d., 6d., 9d. fine per share and so on in progression, but simply 3d. per share fine, each month: *In re Tierney*, 9 Ir. Eq. Series 1 (1874).

Where the rules of a society provided for the imposition of fines according to a scale shown in a table covering a period of six months, *Held*, that only fines for six months could be imposed. It was not proper to ascertain the principle underlying the imposition of fines during the six months and fine according to that principle for the whole time of the delinquency, even though it greatly exceeded six months: *Lovejoy v. Mul Kern*, 46 L. J. Ch. Div. 630 (1877). A fine of 1s. on the pound in default, cannot be divided and where the de-

fault is of a fraction of a pound, no fine can be levied: *Three Towns, etc., Soc. v. Doyle*, 13 C. B. (N. S.) 290 (1862). But a fine of 10 cents for a failure to pay as dues 25 cents a week on each share, the par value of which is \$150, is a reasonable fine: *McGannon v. Central B. Assoc.*, 19 W. Va. 726 (1882).

Fines against Borrowers and Depositors.—Borrowers cannot be fined for non-payment: *Parker v. United States, etc., Ass'n*, 19 W. Va. 744 (1882), and while fines may be authorized by law as against members of a company or association, they cannot be imposed on depositors: *Forest City, etc., Ass'n v. Gallagher*, 25 Ohio St. 211 (1874).

Interest is not allowable on fines: *Ingoldby v. Riley*, 28 L. T. R. (N. S.) 55 (1873). And fines cannot be imposed for the non-payment of interest: *Forest City, etc., Co. v. Gallagher*, 25 Ohio St. 211 (1874); *Hagerman v. Ohio, etc., B. Ass'n*, 25 Ohio St. 186 (1874).

Fines cannot be imposed for the non-payment of interest because the relation between the company and the person owing it interest, is that of debtor and creditor, not that of company and member, and while the law may authorize a company to fine persons as its *members*, for derelictions of duty as *members*, it does not authorize it to fine persons who are its debtors, for derelictions of duty as such, and not as members. Perhaps, too, it may be fairly objected that the imposition of a fine for the non-payment of interest is usurious: *Hagerman v. Ohio, etc., Ass'n*, 25 Ohio St. 186 (1874).

Security.—When a fine is valid, as it may be for, say, the non-payment of installments on stock: *Parker v. Butcher*, 36 L. J. Eq. 552 (1867); payment of it may be secured by

mortgage: *Hagerman v. Ohio B., etc., Ass'n*, 25 Ohio St. 186 (1874); and it must be paid even, when not mentioned in the mortgage: *Clarkville, etc., Ass'n v. Stephens*, 11 C. E. Gr. (N. J.) 351 (1875).

Wife may be bound by.—Even a wife may be bound by a fine levied against her husband. A married woman joining in a mortgage given to secure the payment of fines levied against her husband by a building association, of which he was a member is bound thereby: *Juniata B. Ass'n v. Mixell*, 84 Pa. St. 315 (1877). But as to recovering fines from married women, see also *Wolbach v. Lehigh B. Ass'n*, 84 Pa. St. 211 (1877); *Miner v. Graham*, 12 Harris (Pa.) 491 (1855); *Glass v. Warwick*, 4 Wright (Pa.) 140 (1861); *Patterson v. Robenson*, 1 Casey (Pa.) 81 (1855); *Black v. Galway*, 12 Harris (Pa.) 18 (1854); *Tanner's Appeal*, 95 Pa. St. 118 (1880); see also *Massey v. Citizens' Bldg. Ass'n*, 22 Kansas, 624 (1879).

Cash payment must be made where required.—Executive officers have no authority to set aside a by-law of their company, requiring the cash payment of fines or dues: *People's Bldg. Ass'n v. Wroth*, 43 N. J. Law 70 (1881). In this case, it was customary for some members of a building association to pay their dues to the secretary or president, with the request that he would pay the treasurer, to save the necessity of attendance at the monthly times of payment. In some cases, when these members were not prepared to pay, the officer assumed the payment for them. Again, the payments were sometimes withheld, and the bare promise given by the officer who acted for these members, was received by the treasurer as cash and was so entered on the books. *Held*, that the treasurer and his sure-

ties were liable to account for payment so entered, just as if the cash was in fact received, even though all the above proceedings were known and sanctioned by all the executive officers of the association.

Notice of finable delinquency is essential.—Notice of default in the payment of dues or fines must be given, before a company can take proceedings to enforce payment by expulsion or otherwise: *Wachtel v. The Noah Widows', etc., Society*, 84 N. Y. 28 (1881). In the absence of any agreement by the members of a company or association or any provision in its charter or by-laws for a different mode of service of a notice of default in paying fines or dues, service should be made personally, as required at common law, where the object is to deprive a person of his rights or property; or if such service can be dispensed with, then it should be made in such other mode as will be most likely to effect its object: *Id.* Omission to serve notice of a member's default in paying a fine or an assessment is not excused by his change of residence: *Id.* Especially is notice of default in payment of fines or dues required, where the member has died and it is sought to enforce payment against his executor or administrator or heirs: *Id.*

Fine, not a penalty relieved against in equity.—A fine is not a penalty against which equity will relieve, where it is not unreasonable: *Matterson v. Elderfield*, L. R. 4 Ch. App. 207 (1869); *Thompson v. Hudson*, 2 Ch. App. 255 (1867); *Parker v. Butcher*, 36 L. J. Ch. 552.

The sum stipulated to be paid by a member of a building association, under by-laws or regulations authorized by its charter, for a default in settling his weekly dues is not a forfeiture non-enforceable in equity, but

is simply an amount conventionally due upon the accruing of the weekly installment and the failure to pay it accordingly. It is in the nature of liquidated damages, agreed to be paid for the non-performance of a promise or covenant, and where they are not unconscionable or disproportioned to the exigency of the case, a court of equity will award their payment, more especially when incidentally involved in a matter confided to its peculiar jurisdiction and control, *e. g.*, foreclosure of a mortgage. From the character of these building associations, the imposition of adequate fines as agreed upon by the by-laws, is justified in order to prevent default in the punctual payment of the weekly dues, upon which, the success of the company depends; or in case of default, that some reasonable equivalent for the consequent damage sustained, may be provided: *Shannon v. Howard Mut. Bldg. Ass'n*, 36 Md. 393 (1872).

Enforcement in equity.—If equity would not enforce the collection of reasonable fines, upon foreclosure of a mortgage to a building association, the anomaly of sending the company into a court of law to collect the fines would be presented. It would be difficult successfully to manage such institutions, under such conditions: *Shannon v. Howard Mut. Bldg. Ass'n*, 36 Md. 394 (1872). Fines, therefore, may be included in decree of foreclosure of mortgage: *Hagerman v. Ohio B. & S. Ass'n*, 25 Ohio St. 186 (1874).

A covenant to pay "all fines imposed by the articles of the association," does not make the articles a part of the mortgage or authorize the court to consider them in construing it: *Robertson v. Am. Homestead Ass'n*, 10 Md. 397 (1857).

The payment of stated dues and

finances cannot be resisted by a member on the ground that the by-laws of the association have not been adopted by a vote of the directors, where it appears that they have been recorded, acted upon, and enforced as the by-laws of the association: *Hagerman v*

Ohio, etc., Ass'n, 25 Ohio St. 186 (1874).

Fines must be paid, even when not mentioned in mortgage: *Clarkville, etc., Ass'n v. Stephens*, 11 C. E. Gr. (N. J.) 351 (1875).

ADELBERT HAMILTON.

Supreme Court of Wisconsin.

GIVEN v. WISCONSIN ODD FELLOWS' MUTUAL LIFE INS. CO.

A certificate of insurance, in the nature of a policy on the husband's life for the benefit of his wife and payable to her after his death, where she dies before he does, is payable to the person entitled thereto under the rules and by-laws of the company which issued it.

THE defendant was an incorporated company carrying on the business of life insurance on the mutual benefit plan, but confined its membership to members in good standing in the Independent Order of Odd Fellows in Wisconsin, and certain female relatives of Odd Fellows, and granted insurance for the benefit of the families of the insured.

The rules and by-laws of the company provided that any member thereof "may at any time before his or her death, notify the secretary, in writing, to whom his or her insurance shall be paid after his or her death, which notice the secretary shall keep on file in his office, and in all such cases the said insurance shall be paid directly to the person designated in such notice." It was further provided therein, that on the death of the member, "the person designated before death or his widow, child or children, mother, sister or sisters, father, brother or brothers, as the case may be, and in the order named, if not otherwise directed by the deceased previous to death, shall receive out of the funds of the company * * * the sum of \$1,000, ninety days after due proof of death." And further, "if the deceased member leaves no such relatives, nor any direction for the payment of the money, the company shall pay the expenses of his burial, if there be sufficient funds, and any surplus shall be paid to the lodge of which deceased was a member, to be placed in the widow and orphans' fund of such lodge."